

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHARLYN K. COLLINS**

Claimant

VS.

**DOLD FOODS, INC.**

Respondent

Self-Insured

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Docket No. 220,681

**ORDER**

Claimant requested Appeals Board review of the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on March 27, 1997.

**ISSUES**

Claimant requested the Appeals Board to review the issue of whether claimant gave respondent timely notice of accident as required by K.S.A. 44-520.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue claimant has raised is one listed in K.S.A. 1996 Supp. 44-534a that grants the Appeals Board jurisdiction to review a preliminary hearing order.

The claimant filed an application for hearing on March 4, 1997, with an alleged single date of accident of August 15, 1996. On March 20, 1997, claimant filed an amended application for hearing alleging a single date of accident of September 15, 1996. At the preliminary hearing held on March 27, 1997, claimant argued she was now claiming a date of accident occurring each and every working day from April 1996 through September 15, 1996. Following the claimant's testimony at the preliminary hearing, the Administrative Law Judge found claimant had sustained an accidental injury in April or May of 1996, instead of the dates of accident alleged by the claimant. The Administrative Law

Judge found the preliminary hearing record established that claimant injured her back on a date certain in April or May of 1996, when she felt a pop in her back while reaching over the assembly line at work. The Administrative Law Judge denied claimant's request for preliminary hearing compensation benefits finding she had failed to comply with the provisions of the notice statute found in K.S.A. 44-520. The Administrative Law Judge found claimant had failed to provide respondent with notice of the accident within ten days thereof and further failed to establish "just cause" for failure to give the required 10-day notice.

Claimant testified she initially injured her back while performing her job duties as a scaler. Claimant described the scaler job as requiring her to weigh and box bacon while the product was moving down an assembly line. Claimant testified she felt a pop in her back in April or May of 1996. She further testified she was able to continue performing her work duties but her symptoms worsened until finally she had to seek medical treatment at a hospital emergency room on September 16, 1996. The following day, September 17, 1996, claimant saw her family physician, Brian A. Johnson, M.D., for her low back pain. Dr. Johnson return claimant to work but restricted claimant to lifting of not more than 10 pounds. Respondent was unable to accommodate this restriction and took claimant off work.

Dr. Johnson treated claimant's low back injury conservatively which included physical therapy and epidural injections. An MRI study was performed on December 3, 1996, which showed an asymmetric disc protrusion at L3-L4 on the left. Dr. Johnson then referred claimant for a second opinion to William M. Shapiro, M.D., a neurosurgeon in Wichita, Kansas.

Dr. Shapiro first saw claimant on January 6, 1997, and prescribed physical therapy with strengthening exercises against resistance. Dr. Shapiro released claimant to return to work for the respondent on March 21, 1997, without restrictions. At the time of the preliminary hearing, claimant was working for the respondent but testified she continued to have pain in her low back.

Claimant testified she notified her supervisor and respondent's personnel manager, Mike Pick, that she injured her back at work in April or May of 1996. Claimant also testified she told Mr. Pick on September 17, 1996, that she suffered a further injury to her low back at work. Claimant claims Mr. Pick told her a workers compensation claim could not be filed unless she knew the specific time and the date she was injured at work. Consequently, claimant testified she then applied for and received short term disability benefits by stating on the application that her injury was not work related. However, Dr. Johnson also had to fill out the disability application and he did relate claimant's injury to her work.

Scott Haynes, respondent's current personnel manager, testified in person before the Administrative Law Judge at the preliminary hearing. Mr. Haynes was not the personnel manager at the time of claimant's alleged accident of September 15, 1996. He had succeeded Mr. Pick in November of 1996. Mr. Haynes produced from claimant's personnel file a memo written by Mr. Pick dated September 17, 1996. This memo indicated claimant had been in Mr. Pick's office and notified him she had missed work the day before on

September 16, 1996, because of a back injury. The memo indicated Mr. Pick asked the claimant how she injured her back. Claimant replied she might have injured her back at work. The memo further indicated Mr. Pick notified claimant she could not make a workers compensation claim unless she knew the time and date of injury. Claimant was also asked at the preliminary hearing whether or not she told Mr. Pick on September 17, 1996, that her low back injury was caused by her work. Claimant answered she told Mr. Pick her back injury was related to her work.

The Appeals Board finds, based on the current state of the preliminary hearing record, that the claimant has proved by a preponderance of the credible evidence that she initially suffered a low back injury at work in April or May of 1996. Following that initial injury, claimant continued to perform her regular work activities for the respondent until September 16, 1996, when her low back symptoms had worsened to the point that she had to seek medical treatment. Claimant was then given work restrictions on September 17, 1996, by Dr. Johnson. The respondent could not accommodate claimant and took her off work. The Appeals Board finds claimant's appropriate date of accident is the day claimant was taken off work, September 17, 1996, because of her work-related injury. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The Appeals Board also finds claimant notified the respondent of her accident through a conversation with respondent's personnel manager, Mike Pick, on September 17, 1996. Accordingly, the Appeals Board finds claimant gave notice of her accident within the 10 days as required by K.S.A. 44-520.

For the reasons stated above, the Appeals Board reverses the decision of the Administrative Law Judge that claimant failed to give respondent notice of accident and remands the matter to the Administrative Law Judge to make appropriate findings in regard to claimant's request for preliminary benefits.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish dated March 27, 1997, is reversed and remanded to the Administrative Law Judge for appropriate findings on claimant's request for preliminary benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

c: David H. Farris, Wichita, KS  
Douglas J. Johnson, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director